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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

NO. 807

UNITED GAS PUBLIC SERVICE COMPANY,
Appellant

versus

STATE OF TEXAS, ET AL.,
Appellees

APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLEES' MOTION TO DISMISS

To the Honorable Supreme Court of the United States:

Appellees move that this appeal be dismissed, as having been improvidently granted, for the following reason:

PROPOSITION:

THIS COURT HAS NO JURISDICTION OF THIS CAUSE FOR THE REASON THAT THE APPEAL WAS TAKEN SOLELY FROM THE COURT OF CIVIL APPEALS FOR THE THIRD

SUPREME JUDICIAL DISTRICT OF TEXAS (AN INTERMEDIATE APPELLATE COURT) AND FROM THE FINAL JUDGMENT OF OCTOBER 30, 1935, RENDERED BY SAID COURT, AND NOT FROM THE SUPREME COURT OF TEXAS, (THE HIGHEST COURT OF THE STATE) OR FROM THE JUDGMENT OF SAID HIGHEST COURT, DATED OCTOBER 6, 1936, REFUSING WRIT OF ERROR AND THUS AFFIRMING, WITHOUT OPINION, THE JUDGMENT OF THE COURT OF CIVIL APPEALS; AND THE APPEAL, THEREFORE, HAS NOT BEEN TAKEN FROM THE FINAL JUDGMENT OF THE "HIGHEST COURT OF A STATE IN WHICH A DECISION IN THE SUIT COULD BE HAD", AND WAS ACTUALLY HAD IN THIS CASE, AS PROVIDED BY SECTION 237 OF THE JUDICIAL CODE, U. S. C. TITLE 28, SECTION 344 (a).

STATEMENT.

Appellant has appealed solely from the Court of Civil Appeals and from the final judgment of said Court of October 30, 1935, and does not even purport to have appealed from the Supreme Court of Texas, or from the judgment of that Court refusing application for writ of error, October 6, 1936, or from the order of the Supreme Court of Texas overruling Appellant's motion for rehearing of such application, December 30, 1936. The necessary excerpts from the record to substantiate this statement will be found in *Appendix A* hereof.

As stated by Appellant in its jurisdictional statement (*Appendix A hereof*, pp. 21, 22, 23) this case was not final in the Court of Civil Appeals but the Supreme Court of Texas had, and actually exercised, jurisdiction thereof under Sub-division 5 of Article 1728, R.C.S. of Texas, the Railroad Commission of Texas being parties to this case.

ARGUMENT.

It is to be observed, from the excerpts in *Appendix A*, that Appellant's own appeal papers reflect affirmatively in the record that the application for writ of error was filed in the Court of Civil Appeals, later transmitted to and duly filed in the Supreme Court of Texas, and that such application, together with Appellant's motion for rehearing thereof, were overruled by the Supreme Court of Texas. See Par. 5 of *Appendix A* hereof. It further appears therefrom that Appellant's praecipe for contents of the transcript to come up to this Court was split in twain, and the two parts thereof were designed to bring up both the principal record which was first transmitted from the Court of Civil Appeals to the Supreme Court of Texas in connection with the application for writ of error and later on denial thereof remitted back to the Court of Civil Appeals, *and also a portion of the record remaining in the Supreme Court of Texas itself*, consisting of the original application for writ of error (which under the State law and practice remains on file in the Supreme Court of Texas after denial) and the State Supreme Court's orders refusing such application and overruling motion for rehearing thereof. See Par. 7 of

Appendix A hereof. Appellant does not show that it has, and as an actual fact it has not, presented petition for appeal to any Justice of the Supreme Court of Texas or to any Justice of this Honorable Court within the time or in the manner provided by Federal law, purporting or attempting to appeal from the judgment of the Supreme Court of Texas of October 6, 1936, refusing Appellant's application for writ of error, or from its order of December 30, 1936, overruling Appellant's motion for rehearing of its application for writ of error.

This Court has held that where the state court of last resort is vested with appellate jurisdiction to review the judgment of an intermediate appellate court, and has declined to grant the writ, this Court will accept the interpretation of the state court of last resort as to whether the denial of writ amounts to a total *refusal to exercise jurisdiction*, or whether it constitutes in effect an actual exercise of such jurisdiction, and is tantamount to an *affirmance* of the intermediate appellate court's judgment without written opinion. In the latter event, the appeal properly lies from the judgment of the state court of last resort and not from that of the intermediate appellate court.

Norfolk and Southern Turnpike Co. vs. Virginia, 225 U. S. 264, 267-269, 56 L. Ed. 1082;
F. S. Royster Guano Company vs. Virginia, 253 U. S. 412, 413, 64 L. Ed. 989;
Hetrick vs. Lindsey, Ohio, 265 U. S. 384, 386, 68 L. Ed. 1065;
Matthews vs. Huwe, 269 U. S. 262-266, 70 L. Ed. 266;

Tumey vs. State of Ohio, 273 U. S. 510, 515, 71 L. Ed. 749;
Van Huffel vs. Harkelrode, 284 U. S. 225, 230, 231, 76 L. Ed. 256;
Whitfield vs. Ohio, 297 U. S. 431, 435, 80 L. Ed. 778, 782.

The present law conferring jurisdiction upon the Supreme Court of Texas to review judgments of the Courts of Civil Appeals by writ of error is embraced in Article 1728 of the Revised Civil Statutes of Texas, 1925 Revision, as amended by Act of 1927. *(Appendix E hereof)*

In order that this Court may, if it wishes, trace with understanding the evolution of our present Article 1728, as amended in 1927, we may explain that the subject matter of said Article has been taken from the following jurisdictional Acts, of which we append true copies of the pertinent portions as appendices hereto, and explain that such Acts have been carried into code revisions in the Revised Civil Statutes of Texas of 1895, 1911, and 1925:

Appendix B:

Acts of 1892, Chapter 14 (S.B. 33, H. B. 12) approved April 13, 1892, amending certain Articles of the Revised Civil Statutes of 1879.

Appendix C:

Acts of 1913, Chapter 55 (H. B. 117) approved March 28, 1913, effective ninety days thereafter, amending certain Articles of the Revised Civil Statutes of 1911.

Appendix D:

Acts of 1917, Chapter 75 (H. B. 38) approved March 15, 1917, effective July 1, 1917, amending the jurisdictional Article of Revised Civil Statutes of 1911; and Chapter 76 (H. B. 39) approved and effective March 15, 1917, authorizing Justices of the Supreme Court of Texas to designate Justices of the Courts of Civil Appeals to pass upon applications for writs of error and providing that in such cases the refusal of application for writ of error by such designated Justices of the Courts of Civil Appeals should not be regarded as "a precedent or authority in any other cause." Also the substance of said Chapter 76, as now embodied in Articles 1748-1752 inclusive, of the Revised Civil Statutes of Texas, 1925.

Appendix E:

Acts of 1927, Chapter 144 (S. B. 7) approved March 25, 1927, effective ninety days thereafter, amending Article 1728 and providing for the first time that the Supreme Court of Texas should *refuse* application for writ of error where it approves both the judgment and opinion of the Court of Civil Appeals and should "dismiss for want of jurisdiction" where it approves the judgment below, but does not approve the opinion below.

The only Texas case wherein the Supreme Court of this State has directly passed upon the legal effect of its refusal of a writ of error, as being an *affirmance*, and as distinguished from a *dismissal* "for want of jurisdiction," is *Gammel Statesman Publishing Company vs. Ben C. Jones and Company*, 206 S. W. 931, (not officially reported) by the Commission of Appeals of

Texas, (a statutory auxiliary branch of the Supreme Court of Texas) decided December 11, 1918, and in which the opinion and judgment of the Commission of Appeals were expressly adopted as those of the Supreme Court of Texas, per memorandum of Phillips, Chief Justice. That case is so important and controlling that we have appended hereto as *Appendix F*, a certified copy of the opinion, judgment, and order of adoption. In that case action had been brought in the District Court by Ben C. Jones and Company, as Plaintiff, against Gammel Statesman Publishing Company, et al, as Defendants. The trial court rendered judgment in favor of the defendants. Plaintiff appealed to the Court of Civil Appeals, which Court first rendered opinion and judgment affirming the trial court. Plaintiff (appellant), after making several motions in the Court of Civil Appeals, filed *its* application for writ of error with the Supreme Court of Texas, which Court on February 7, 1912, *refused* such application as in this case. The record was thereafter duly remitted to the Court of Civil Appeals as provided by Rule 4 of the Supreme Court of Texas, *Appendix G* hereof.. Plaintiff thereafter filed in the Court of Civil Appeals several more successive motions to set aside the previous judgment of the Court of Civil Appeals. The Court of Civil Appeals granted the last of those motions and entered its opinion and decree, purporting to set aside its previous judgment of affirmance, and remanding the cause to the District Court for new trial. From this last mentioned order of the Court of Civil Appeals the defendants, in whose favor the cause had previously been decided, filed with the Supreme Court of Texas *their* application for writ

of error. The original plaintiff and appellant, Ben C. Jones and Company, moved to dismiss this second application for writ of error for want of jurisdiction. The Supreme Court of Texas overruled that motion, *and in holding that the State Supreme Court's previous action in refusing the first application for writ of error was an affirmance of the judgment of the Court of Civil Appeals, which judgment thereby became the judgment of the State Supreme Court,* the Commission of Appeals in its opinion said:

> "The motion in the case before us was filed and acted upon by the Court of Civil Appeals after the Supreme Court had *refused* a writ of error in said cause, *and by such action affirmed the original judgment of the Court of Civil Appeals and that of the trial court.* The judgment of the Court of Civil Appeals entered in granting the motion not only set aside and vacated its judgment rendered at a former term, *but also in effect set aside and vacated the judgment of the Supreme Court in denying the writ of error in said cause. It is well settled that, when the jurisdiction of the Supreme Court attaches,* the Court has full control of the cause and can make such orders concerning it as may be necessary to preserve the rights of the parties and enforce its mandates. *Its jurisdiction continued until the case is fully determined by the Court and its judgment is completely executed by the Court below.* For the purpose of enforcing its mandates, it may make any order, and, if necessary, may resort to the writ of mandamus or any other appropriate writ known to our system of jurisprudence. Wells v. Littlefield, 62 Tex. 28. *The action of the Supreme Court in refusing a writ of error in this cause was*

binding on the Court of Civil Appeals. The Court of Civil Appeals at the time the motion under review was filed and acted upon was without jurisdiction of the case and had no power to enter any order or judgment therein . . . .

"To hold otherwise would be to deny to the Supreme Court its power as a court of last resort. . . . . . (Italics ours)

"We are of the opinion that the motion to dismiss the application for writ of error should be overruled, and that the order and judgment entered by the Court of Civil Appeals setting aside and vacating its former judgment and reversing and remanding the cause for a new trial should be held to be void and of no effect."

Phillips, Chief Justice of the Supreme Court of Texas, then entered the following endorsement in the cause:

"The *judgment* recommended by the Commission of appeals is adopted and will be entered as the *judgment* of the Supreme Court. *We approve the holding of the Commission on the question discussed.*" (Italics ours)

Thus, it is clearly apparent that the Supreme Court of the State not only adopted the judgment recommended by the Commission of Appeals in the case, but also approved the *opinion in toto* and adopted it as the opinion of the *Supreme Court proper*.

Thus, in the only case with which we are acquainted in which the Supreme Court of Texas squarely passed upon the effect of the refusal of the writ (as distinguished from its dismissing of an application "for want of jurisdiction" under the present statutory practice), it has plainly and authorita-

tively been decided, that refusal of an application for writ of error amounts to an express affirmance of the judgment of the Court of Civil Appeals, and makes that judgment the judgment of the Supreme Court of Texas, so that the latter is vested with plenary jurisdiction thereafter to enforce its judgment by all appropriate process; and this, although the record transmitted from the Court of Civil Appeals to the Supreme Court of Texas on application for writ of error, upon refusal of such writ, is required to be remitted to the Court of Civil Appeals, whence the mandate issues for the enforcement of the judgment. See Articles 1767, 1768, R.C.S. Tex. 1925, and Rule 4 of the Supreme Court of Texas, quoted in *Appendix G* hereof. This mandate from the Court of Civil Appeals, after writ refused by the Supreme Court of Texas, is, therefore, a mandate not merely for the enforcement of a judgment of the Court of Civil Appeals, but for the enforcement of a *judgment of the Supreme Court of Texas itself*, and it is only in rare and exceptional instances, such as that illustrated by the unusual case above cited, that the Supreme Court of Texas ever has occasion to intervene and enforce its judgment by extraordinary process. *If the Texas Supreme Court's action in refusing an application for writ of error were a refusal to exercise jurisdiction, rather than an affirmance of the judgment below, its jurisdiction would never have attached in the case cited, and it would, therefore, have had no power to intervene on the second application and enforce its previous judgment refusing the writ of error, and the Court of Civil Appeals would have remained free to deal with its own final judgment as it might see fit.*

If this was the law prior to the Act of 1927, (and plainly it was, as the above cited case has never been overruled or modified but is still the sole authority on the point), then the same rule even more plainly applies, and with greater force, under the amendment of 1927, (*Appendix E* hereof) wherein for the first time it was provided that upon application for writ of error the Supreme Court of Texas should refuse same if it approves both the judgment and the opinion below, but should merely "dismiss for want of jurisdiction" where it is satisfied with the *result* reached by the Court of Civil Appeals, but not satisfied with the principles of law or reasoning enunciated in the opinion of the latter court.

Thus, under the present practice, it is plain, beyond controversy, that where the Supreme Court of Texas *refuses* an application for writ of error, as it has done in the present case, and does not merely dismiss the same "for want of jurisdiction", under the Act of 1927, it necessarily approves and affirms, without new written opinion of its own, both the judgment and the opinion of the Court of Civil Appeals. The reason the State Supreme Court ordinarily does not write a new opinion of its own is that by the very act of refusing the application, under the express provisions of the present law, it necessarily adopts and approves as its own the *opinion* as well as the judgment of the Court of Civil Appeals. What would be the point of writing another opinion in addition to, and merely paraphrasing, the opinion of the court below, which under the Act of 1927 it approves and adopts as its own, by the act of refusing the writ? As a matter of fact the Supreme Court of Texas, in refusing

writs of error in some cases in which it deems it important to do so, does write opinions. See *Henderson vs. Chesley*, 116 Tex. 355, 292 S. W. 156, and *T. & N. O. Ry. Co. vs. Neill*, 100 S.W. (2d) 348, not yet officially reported. What more could the Supreme Court of Texas do by way of affirmance by actual exercise of jurisdiction than to approve and adopt as its own both the judgment and opinion of the intermediate appellate court, with the con comitant legal result that, as held in the *Gammel Statesman Publishing Company case, supra*, the Supreme Court of Texas has jurisdiction to enforce same as its own?

Under the cases from this court above cited, the appeal to the Supreme Court of the United States should, therefore, have been taken from the Supreme Court of the State, and from its judgment, and *not* from the Court of Civil Appeals, or its judgment.

This Court should not be confused by cases wherein the Supreme Court of Texas has no potential jurisdiction whatever to review a particular judgment, as illustrated in the case of *Burguieres v. Farrell*, 87 S.W. (2d) 463. (Texas Supreme Court, not officially reported.) See also *Pacific G. & E. Co. vs. Police Court of Sacramento*, 251 U. S. 22, 24, 64 L. Ed. 112. The case at bar is different from the statutory "dismissal for want of jurisdiction" under Article 1728, as amended in 1927. This class of cases is illustrated by *Bain Peanut Company of Texas v. Pinson and Guyger*, 119 Tex. 572, 34 S. W. (2d) 1090; *Fisher v. City of Bartlett*, 88 S. W. (2d) 1068; and *Houston Oil Company of Texas v. Village Mills*, 109 Tex. 169, 202 S. W. 725, 226 S. W. 1075. In this class of cases, an appeal to this Court from the judgment

of the Court of Civil Appeals, rather than that of the Supreme Court of Texas, has been sustained: *Bain Peanut Company of Texas v. Pinson*, 282 U. S. 811, 75 L. Ed. 726; 282 U. S. 499, 75 L. Ed. 482.

The only cases cited by Appellant to sustain the jurisdiction of this Court on appeal from the Court of Civil Appeals, where writs of error have been *refused* by the Supreme Court of Texas, are:

Bacon v. Texas, 163 U. S. 207, 215; 41 L. Ed. 132 (1896);
Sullivan v. Texas, 207 U. S. 416, 422; 52 L. Ed. 274 (1908);
S. A. and A.P.R. Co. v. Wagner, 241 U. S. 476, 477; 60 L. Ed. 1110 (1916);

If it will be of any aid to the Court, we might also cite:

Stanley v. Schwalby, 162 U. S. 255, 269; 40 L. Ed. 960 (1895);
T. and N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111, 113; 57 L. Ed. 442 (Jan. 27, 1913);
St. L. S. F. and T. R. R. Co. v. Seale, 229 U. S. 156; 57 L. Ed. 1129 (May 26, 1913);
Zucht v. King, 260 U. S. 175; 67 L. Ed. 174 (Nov. 13, 1922);
Barwise v. Sheppard,____ U.S.____; 81 L. Ed.____ (Adv. Op. No. 10, Nov. 9, 1936).

The only reason we can conceive why jurisdiction was sustained in the above cited cases was that all of them, with the exception of *Zucht v. King*, and *Barwise v. Sheppard*, were decided before the 1917 Act went into effect, and before the decision of the Supreme Court of Texas of December 11, 1918, in *Gammel*

Statesman Publishing Company vs. Ben C. Jones and Company, supra, which case has apparently never been brought to the attention of this Court. All of such cases, with the exception of *Barwise v. Sheppard,* were decided before the 1927 amendment.

In some of the above cited cases no motion to dismiss was filed or urged in this Court. This was true in *Barwise v. Sheppard, supra.* In others, the Appellees either did not have available, or at least did not clearly or adequately present to this Court, the conclusive authorities upon which we now rely.

No matter what conclusion this Court may have reached on this question of exclusively state law in its prior decisions in the absence of and prior to any decision of the question by our highest state court, or through not being fully advised in the premises; when our State Supreme Court decided *Gammel Statesman Publishing Company v. Ben C. Jones and Company,* supra, this Honorable Court became bound to follow same thereafter, once it is properly called to this Court's attention: *Edward T. Blair v. Commissioner of Internal Revenue,* No. 247, Feb. 1, 1937, 81 L. Ed.....,(Adv. Op. No. 7, 265). *Ernest O. Thompson, et al v. Consolidated Gas Utilities Corporation,* id. 270, 280. Where appellees in a long series of cases and over a long period of years fail to present the law properly to this Court, and thus waive their rights, the practice of allowing appeals from the intermediate appellate courts where their judgments have been affirmed by refusal of writs of error by the Supreme Court of Texas, does not become fixed, or rendered proper, merely by reason of hoary age or long acquiescence,

where the impropriety thereof is duly called to this Court's attention as these Appellees are now doing in this motion. While this Court will take judicial notice of the law of a State when properly called to its attention, yet the existence of the law must be made to appear to this Court clearly: *Shapleigh v. Mier*,_____ U.S._____, 81 L. Ed._____ (Adv. Op. No. 5, Jan. 4, 1937).

If this Court entertains any doubt whatsoever as to the action of the Supreme Court of Texas in refusing a writ of error (as was done in this case) being in legal effect an actual exercise of jurisdiction and an affirmance upon the merits, Appellees will file motion in the Supreme Court of Texas for a supplemental opinion upon this point and submit same to the Supreme Court of Texas for such action as it may deem proper.

that the action of our State Supreme Court in refusing a writ of error under the present law and practice is a refusal to exercise any jurisdiction at all and is not an affirmance of the judgment of the Court of Civil Appeals, because of the provisions in Article 1750 of the Texas Revised Civil Statutes of 1925 that "the refusal or dismissal of any application shall not be regarded as a precedent or authority." That provision was first enacted as a part of Section 4 of H. B. 39, Chapter 76, of the Act of 1917, (*Appendix D*). A reading of that Act discloses that it was enacted as a measure to relieve the crowded condition of the Application Docket of the Supreme Court of Texas. It provided that the Justices of the Supreme Court might designate three Justices from the Courts of Civil Ap-

peals to pass upon such applications for writs of error as the Supreme Court might refer to them, and that this practice might be followed as long as, and whenever, the crowded condition of the docket might require it. Obviously where applications for writs of error were passed upon by Judges of the Courts of Civil Appeals, and not by the Justices of the Supreme Court, it was not deemed by the Legislature that the refusal or dismissal of an application for writ of error by such Judges of the Courts of Civil Appeals should be regarded as making the judgment of the Court of Civil Appeals a judgment of the Supreme Court proper, by approval and adoption, so as to be regarded as a "precedent or authority" of the Supreme Court in other causes, as would be the case where a writ of error was refused upon consideration by the Judges of the Supreme Court itself. For that reason in Section 4 of said Act it was for the first time enacted that "the refusal or dismissal of any application shall not be regarded as a precedent or authority in any other cause." A reading of the entire Chapter, more particularly Section 4 thereof, discloses that the above quoted provision was intended to apply, and does now apply, only to cases where such designated Justices of the Courts of Civil Appeals pass upon and refuse or dismiss applications for writs of error, and does not apply to cases where the Justices of the Supreme Court proper have denied such applications as is the case in this appeal. The Supreme Court of Texas experimented with the power granted in 1917 only a few months during that year, and upon its being found unsatisfactory and impractical it was abandoned and has not been used since.

In this present case, the Appellant's application for writ of error was not passed upon by any Judges of the Courts of Civil Appeals, but was passed upon by the three Justices of the Supreme Court proper and the judgment and opinion of the Court of Civil Appeals thereby became an authoritative decision of the Supreme Court of Texas, itself. If this Court desires we will make motion in the Supreme Court of Texas for a supplemental opinion embracing these facts subject to such action as that Court may see fit to take.

was effective at the time our Supreme Court decided the case of *Gammel Statesman Publishing Company v. Ben C. Jones and Company, supra;* on December 11, 1918. In that case the first application for writ of error, (made by Ben C. Jones and Company on January 4, 1912, and denied by the Supreme Court of Texas on February 7, 1912) was governed by the provisions of the Act of 1892, *(Appendix B);* and at the time that application was acted upon, it was refused by the members of the Supreme Court proper and not by Justices of the Courts of Civil Appeals. Obviously, then, the authority of *Gammel Statesman Publishing Company v. Ben C. Jones and Company, supra,* is not in the least militated against by the presence, in the 1917 Act, of the provision that "the refusal or dismissal of any application" (by designated Judges of the Courts of Civil Appeals) "shall not be regarded as a precedent or authority in any other cause," which provision was carried forward into Article 1750 of the Revised Civil Statutes of 1925. (*Appendix* D, p. 42, infra.)

In any event, the above quoted provision does not purport to affect the *legal quality* of the judgment of the Supreme Court of Texas refusing an application for writ of error as being an *affirmance* of the judgment of the Court of Civil Appeals, or merely a *refusal by the Supreme Court of the State to exercise jurisdiction.* It merely prescribes that the refusal of an application for writ of error by designated Justices of the Courts of Civil Appeals, acting for the Supreme Court, shall not make the judgment of the Court of Civil Appeals a judgment of the Supreme Court proper so as to be regarded as a "precedent or authority" as are decisions of the Supreme Court proper. The distinction is plain and based upon reason.

Such provision cannot, therefore, affect in any way the question now before this Court. It certainly cannot detract from the binding effect of *Gammel Statesman Publishing Company v. Ben C. Jones and Company, supra,* which is an authoritative decision of the Supreme Court of Texas itself and is not merely the decision of a Court of Civil Appeals in which a writ of error was refused by designated Justices of the Courts of Civil Appeals.

Respectfully submitted,

WILLIAM MCCRAW,
Attorney General of Texas

ALFRED M. SCOTT,
Assistant Attorney General

EDWARD H. LANGE,
Laredo, Texas

Attorneys for Appellees.

APPENDIX A.

Excerpts from Appeal Papers in Record.

1. From appellant's petition for appeal:

"Considering itself aggrieved by the final judgment in the above entitled cause, entered on October 30, 1935, by the Court of Civil Appeals for the Third Supreme Judicial District of Texas, wherein the Supreme Court of Texas, on October 6, 1936, denied appellant's petition for a writ of error and, on December 30, 1936, overruled appellant's motion for rehearing thereon, and wherein the Chief Justice of said Court of Civil Appeals, on January 7, 1937, declined to allow an appeal to the Supreme Court of the United States, United Gas Public Service Company, appellant in said Court of Civil Appeals, plaintiff-in-error in seeking review by the Supreme Court of Texas, and now appellant in this appeal from said judgment, prays that an appeal may be allowed to the Supreme Court of the United States herein for the reasons specified in the Assignment of Errors hereinafter set out and for an order fixing the amount of the bond thereon. * * *

"The Court of Civil Appeals, by its judgment entered October 30, 1935, (from which judgment this appeal is taken), reformed the judgment below so to enforce the order from its effective date, (January 1, 1932,) and, as so reformed, affirmed the judgment below. This judgment appellant attacked, first by motion for rehearing in the Court of Civil Appeals, and then by petition for writ of error seeking a discretionary review thereof by the Supreme Court of Texas and by motion for rehearing in that court, both said motions being overruled and said petition being denied, all with-

out opinion, the only opinion in the case by any court being that of the Court of Civil Appeals entered October 30, 1935. * * *

"For which errors appellant, United Gas Public Service Company, prays that said judgment entered in the above entitled cause by said Court of Civil Appeals on October 30, 1935, be reversed, and that a judgment be rendered in favor of appellant and for costs."

2. Appellant's assignment of errors:

Each of appellant's assignments filed in connection with and as a part of its petition for appeal, numbered 1 to 13, inclusive, starts off in the following form:

"The Court of Civil Appeals erred" etc.

3. From order allowing appeal and fixing security for costs, drawn by appellant and signed by Mr. Associate Justice Cardozo, January 16, 1937:

"United Gas Public Service Company, appellant in the above entitled cause, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Court of Civil Appeals for the Third Supreme Judicial District of Texas, on October 30, 1935, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and the rules of the Supreme Court of the United States in such case made and provided;

IT IS NOW HERE ORDERED that an appeal be and the same is hereby allowed to the Su-

preme Court of the United States from the Court of Civil Appeals for the Third Supreme Judicial District of Texas in the above entitled cause, as provided by law, and it is further ordered that the clerk of said Court of Civil Appeals shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within forty days from this date;"

4. From the citation in this cause, prepared by appellant and signed by Mr. Justice Cardozo, on January 16, 1937:

"You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, D. C., within forty days from the date hereof, pursuant to an appeal filed in the office of the clerk of the Court of Civil Appeals for the Third Supreme Judicial District of Texas, wherein United Gas Public Service Company is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against said appellant as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf."

5. From appellant's statement as to the jurisdiction on appeal filed in the Court of Civil Appeals in accordance with this Court's Rule No. 12:

"Pursuant to paragraph 1, Rule 12 of the Supreme Court of the United States, as amended March 2, 1936, United Gas Public Service Company, appellant in this appeal from a final judgment entered in the above cause by said Court

of Civil Appeals, respectfully shows the following in support of the jurisdiction of the Supreme Court of the United States to review the aforesaid cause on appeal. * * *

"The judgment sought to be reviewed is the judgment of the Court of Civil Appeals for the Third Supreme Judicial District of Texas entered October 30, 1935, in cause numbered 8176 and styled *United Gas Public Service Company, appellant v. State of Texas, et al,* appellees, * * *

"Pertinent sections of Art. 1728, Revised Civil Statutes of Texas, 1925, are:

" 'Appellate jurisdiction—The Supreme Court shall have appellate jurisdiction coextensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the Courts of Civil Appeals from final judgment of trial courts:

1. * * *
2. * * *
3. Those involving the construction or validity of statutes necessary to a determination of the case.
4. * * *
5. Those in which the Railroad Commission is a party.
6. * * *

"In all cases where the judgment of the court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; * * *'

"Pertinent provisions of the Texas Statutes governing review of decisions of Courts of Civil Appeals by the Supreme Court of Texas are:

" 'Art. 1729.—Writ of error or certificate.—All causes mentioned in the preceding article (1728) may be carried to the Supreme Court either by writ of error or by certificate from the Court of Civil Appeals, * * *

" 'Art. 1740.—Petition for writ of error.—A writ of error before the Supreme Court may be applied for by petition addressed to said Court and the petition shall contain such other requisites as may be prescribed by the Supreme Court; * * *

" 'Art. 1742.—Filing.—The petition shall be filed with the clerk of the Court of Civil Appeals within thirty days from the overruling of the motion for rehearing.'

"Appellant's petition applying for writ of error in this cause was filed with the clerk of the Court of Civil Appeals the 7th day of February, 1936. This petition, accompanied by the record, was filed forthwith in the Supreme Court of Texas and became Application No. 21776 on the docket of that court. The application was denied by the Supreme Court October 6, 1936.

"Motion for rehearing upon action of the Supreme Court of Texas in denying application for writ of error is not covered by the statutes of Texas, but is provided for in Rule No. 4 of the Rules of the Supreme Court of Texas, pertinent provisions of such Rules being as follows:

" 'A motion for rehearing of an application for writ of error is not a matter of right, but in case such motion shall be filed within fifteen days af-

ter the refusal of the application and before the court shall adjourn for the term, the court will consider the same if it be based upon a ground not embraced in the application or contains the citation of authorities not before cited. * * *'

"Appellant's motion for rehearing upon the action of the Supreme Court of Texas in refusing its application for writ of error was filed 22nd day of October, 1936, and overruled 30th day of December, 1936.

"Under Sec. 344(a), Title 28, United States Code, the judgment of the Court of Civil Appeals entered October 30, 1935, became, at the time the Supreme Court of Texas overruled appellant's motion for rehearing, a final judgment or decree in this suit in the highest court of the state of Texas in which a decision in this cause could be had.

"Appellant's application for appeal from this judgment to the Supreme Court of the United States was presented to the Chief Justice of the Court of Civil Appeals for the Third Supreme Judicial District of Texas on January 5, 1937, and by him refused on January 7, 1937; and was presented to Honorable Benjamin N. Cardozo, Associate Justice of the Supreme Court of the United States on January 15th, 1937. * * *

"The opinion of the Court of Civil Appeals entered October 30, 1935, (unofficially reported 89 S. W. (2) 1094) is attached hereto as Appendix "A"; and the opinion of the Railroad Commission of Texas entered June 13, 1933 (unofficially reported 2 P. U. R. (N.S.) 503) is attached hereto as Appendix "B". No other opinion was entered by the Court of Civil Ap-

peals, and no opinions have been entered either by the trial court or by the Supreme Court of Texas.

"The above and foregoing is presented by United Gas Public Service Company, together with its petition for the allowance of an appeal in this case to the Supreme Court of the United States, as its separate typewritten statement, particularly disclosing the bases upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review said final judgment of the Court of Civil Appeals."

6. From appellant's "notice and acknowledgment of service of appellant's praecipes for record," served upon appellees:

"Pursuant to Rule 10, paragraph 2, of the Rules of the Supreme Court of the United States, you are hereby served with one copy for each of you of appellant's praecipe to the Clerk of the Court of Civil Appeals for the Third Supreme Judicial District of Texas and to the Clerk of the Supreme Court of Texas, designating portions of the record to be incorporated in the transcript to be made and certified to the Supreme Court of the United States in this appeal."

7. From appellant's "praecipe for transcript to the Clerk of the Supreme Court of Texas," served upon appellees:

"To the Clerk of the Supreme Court of Texas:

"You are hereby requested to make and certify a true copy of the following from the record of the proceedings of the Supreme Court of Texas upon the application of United Gas Public Service Company for writ of error directed to the Court of Civil Appeals for the Third Supreme Judicial District of Texas in cause No. 8176:

1. Statement from your records showing the date that said petition for writ of error and record were received and filed, and that said proceeding became No. 21,776 upon Application Docket of the Supreme Court of Texas.

2. The copies of the orders of the Court of Civil Appeals accompanying said record.

3. From the petition for writ of error of United Gas Public Service Company, the opening paragraph, and the following numbered assignments of error: 1-15, 17-18, 21, 23, 26, 28-33, 35-37, 39-42, 45-51, 56, 58-59, 62-63, 66-67, 71, 73-74.

4. The order of the Supreme Court of Texas entered October 7, 1936, refusing said application for writ of error, with your endorsement showing that no opinion was entered in connection therewith.

5. From the motion for rehearing filed by United Gas Public Service Company, the opening paragraph, the paragraphs stating the grounds of the motion, and the prayer, with your endorsement showing the date of filing and that said motion became No. 12,899 on the Motion Docket of the Supreme Court of Texas.

6. The order of the Supreme Court of Texas entered December 30, 1936, overruling said motion No. 12,899, with your endorsement showing that no opinion was entered in connection therewith.

7. This praecipe, and notice and acknowledgment of service thereof.

8. Your certificate, including therein your statement as to when the record was returned to the Court of Civil Appeals."

8. From appellant's "praecipe for transcript to the Clerk of the Court of Civil Appeals," served upon appellees:

> "You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States, pursuant to an order of appeal allowed on January 16th, 1937, in the above entitled cause by Mr. Justice Cardozo, and to include in such transcript of record the following from the record on file in this cause: * * *"
>
> "E. 1. Include the transcript of proceedings in the Supreme Court of Texas in this cause, which transcript appellant has requested from the Clerk of said Court."

9. Each of the above mentioned appeal papers, prepared by appellant, and also the appellant's "notice to appellees under Rule 12," was endorsed as follows:

"APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE COURT OF CIVIL APPEALS FOR THE THIRD SUPREME JUDICIAL DISTRICT OF TEXAS."

APPENDIX B.

ACT OF 1892

Section 1. Be it enacted by the Legislature of the State of Texas; That Articles, Numbers 1002, 1005, 1011, 1012, 1014, 1017, 1019, 1023, 1024, 1025, 1033, 1039, 1043, 1044, 1049, 1050, 1056, 1057,

1058, 1060, Title 39, of the Revised Statutes of Texas be and the same are hereby so amended as to read as follows:

ARTICLE 1011.

That the Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, which shall extend to questions of law arising in all civil cases of which the Courts of Civil Appeals have appellate, but not final, jurisdiction.

ARTICLE 1011a

All causes shall be carried up to the Supreme Court by writs of error issuing from the Supreme Court to the Courts of Civil Appeals upon final judgment and not on judgments reversing and remanding causes except in the following cases, to-wit:

(1) Where the State is a party or where the Railroad Commissioners are parties.

(2) Cases which involve the construction and application of the Constitution of the United States or of the State of Texas or of an Act of Congress.

(3) Cases which involve the validity of a Statute of the State.

(4) Cases involving the title to a state office.

(5) Cases in which a Civil Court of Appeals overrules its own decisions or the decision of another Court of Civil Appeals or of the Supreme Court.

(6) Cases in which the judges of any Court of Civil Appeals may disagree.

(7) Cases in which any two of the Courts of Civil Appeals may hold differently on the same question of law.

(8) When the judgment of the Court of Civil Appeals reversing a judgment practically settles the case, and this fact is shown in the petition for writ of error.

ARTICLE 1011b.

Any party desiring to sue out a writ of error before the Supreme Court, shall present his petition to said Court stating the names and residences of the parties adversely interested, with a brief statement of the nature of his case and the ground upon which the writ of error is prayed, and it must appear that the error complained of arose upon questions of law, the determination of which were necessary to the decision of the cause in the Court of Civil Appeals, and that said questions was (were) properly presented to said Court, and it must further appear that the Supreme Court would have jurisdiction thereof; and the petition shall contain such other requisites as may be prescribed by the Supreme Court. The petition must be accompanied with a certified copy of the conclusions of law and fact filed in the cause by the Court of Civil Appeals, with the opinions thereof, together with a certified copy of the judgment in the trial court and of the bond given in the lower court, if any, and if Plaintiff in Error has given no bond, then the Supreme Court in granting the writ shall specify what bond shall be given, and the Plaintiff in Error shall file said bond in the trial court to be approved by the clerk of said

court, and a certified copy thereof shall be at once transmitted to the Supreme Court, and upon the filing of said certified copy, the clerk of the Supreme Court shall issue citation in error as may be prescribed by the rules of the Supreme Court.

ARTICLE 1011c.

If it shall appear to the Supreme Court from an inspection of the petition and record that there is error in said judgment of the Court of Civil Appeals, it shall grant a writ of error returnable in thirty days, in such manner as may be prescribed by said Court.

ARTICLE 1057.

Upon the rendition by the Supreme Court of any such judgment or decree as is contemplated by Article 1049, it shall not be necessary for the lower court from which the cause was removed to make any further order or decree therein, but the clerk of said lower court, on the receipt of the mandate of the Supreme Court or Court of Civil Appeals, shall proceed to issue execution thereon as in other cases.

Approved April 13, 1892.

APPENDIX C.

ACT OF 1913

SUPREME COURT—DEFINING ORIGINAL AND APPELLATE JURISDICTION

H. B. NO. 117. CHAPTER 55.

An Act to amend Articles 1521, 1522, 1543, 1544, and 1526 of the Revised Civil Statutes of 1911

defining the original and appellate jurisdiction of the Supreme Court, and regulating practice therein.

Be it enacted by the Legislature of the State of Texas:

Section 1. That Articles 1521, 1522, 1543, 1544, and 1526 of the Revised Civil Statutes of 1911 of said State be so amended as hereafter to read as follows:

ARTICLE 1521.

The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, which shall extend to questions of law arising in civil causes in the Courts of Civil Appeals in the following cases when same have been brought to the Courts of Civil Appeals by writ of error, or appeal, from final judgments of the trial courts:

(1) Those in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision.

(2) Those in which one of the Courts of Civil Appeals holds differently from a prior decision of its own, or of another Court of Civil Appeals, or of the Supreme Court upon any such question of law.

(3) Those involving the validity of Statutes.

(4) Those involving the revenue laws of the State.

(5) Those in which the Railroad Commission is a party.

(6) Those in which, by proper application for writ of error, it is made to appear that the Court of

Civil Appeals has, in the opinion of the Supreme Court, erroneously declared the substantive law of the case, in which case the Supreme Court shall take jurisdiction for the purpose of correcting such error.

ARTICLE 1522.

All causes mentioned in Article 1521 may be carried to the Supreme Court either by writ of error or by certificate from the Court of Civil Appeals as elsewhere provided, except those mentioned in subdivision 6, which must be presented by application for writ of error.

ARTICLE 1543.

If upon inspection of the petition for writ of error and the record of the cause, it shall appear that a Court of Civil Appeals has failed to file conclusions of fact, or has not complied with the requirements of the law in filing such conclusions, and that such conclusions are necessary to enable the Supreme Court properly to determine the rights of the parties, the courts may suspend action on the petition for writ of error and return the record to the Court of Civil Appeals, with instructions to make and return conclusions of fact upon the points indicated by the Supreme Court.

ARTICLE 1544.

If, upon examination of the petition for writ of error, the Supreme Court shall find the case to be one of which it may take jurisdiction, and that there is such a difference of opinion among the judges of the court from which the cause shall come, or such a difference between the decision brought in question and a

decision of another court, as is specified in Article 1521, or that the question involving the validity of a Statute was erroneously decided, or that, in a case involving the revenue laws of a State, or to which the Railroad Commission is a party, any question of law material to its correct decision was erroneously decided, or that such an error is shown as is contemplated by subdivision 6 of Article 1521, the court shall grant the writ for the purpose of deciding the question as to which the difference exists, or of correcting the erroneous decision and rendering the judgment in which a correct decision thereof shall result.

ARTICLE 1526.

The Supreme Court, or any justice thereof, shall have power to issue writ of habeas corpus as may be prescribed by law; and the said court, or the justice thereof, may issue writs of mandamus, procedendo, certiorari and all writs necessary to enforce the jurisdiction of said court; and said court may issue writs of quo warranto or mandamus agreeable to the principles of law regulating such writs against any district judge, or Court of Civil Appeals or judge of a Court of Civil Appeals, or officer of the State Government, except the Governor of the State.

Section 2. Be it further enacted that this Act shall take effect on the 1st day of July, 1913, and that it shall not affect any business which may be before the Supreme Court at that time, either as to cases granted or as to application for writs of error theretofore filed, or as to motion then pending or thereafter filed with reference to any of such business; provided, that if a

judgment of the Court of Civil Appeals shall be reversed and the cause remanded, such case shall thereafter proceed under the provisions of this bill.

(NOTE:—H. B. No. 117 passed the House of Representatives March 15, 1913, but no vote given; and passed the Senate March 26, 1913, but no vote given.)

Approved March 28, 1913.
Takes effect 90 days after adjournment.

APPENDIX D.
ACT OF 1917

JURISDICTION OF THE SUPREME COURT

H. B. NO. 38 CHAPTER 75

An Act to amend Articles 1521, 1522, 1543, 1544, and 1526 of the Revised Civil Statutes of 1911 as amended by the Acts of the Thirty-third Legislature, approved March 28, 1913, defining the original and appellate jurisdiction of the Supreme Court, and regulating the practice therein.

Be it enacted by the Legislature of the State of Texas:

Section 1. That Articles 1521, 1522, 1543, 1544 and 1526 of the Revised Civil Statutes of 1911 of this State as amended by the Act of the Regular Session of the Thirty-third Legislature, approved March 28, 1913, be so amended as to hereafter read as follows:

ARTICLE 1521.

The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, which shall extend to all questions of law arising in cases of which the Courts of Civil Appeals have appellate

jurisdiction in the following cases when same have been brought to the Courts of Civil Appeals by writ of error or appeal from final judgment of trial courts:

(1) Those in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision.

(2) Those in which one of the Courts of Civil Appeals holds differently from a prior decision of its own or of another Court of Civil Appeals, or of the Supreme Court upon any such question of law.

(3) Those involving the construction or the validity of Statutes.

(4) Those involving the revenue laws of the State.

(5) Those in which the Railroad Commission is a party.

(6) In any other case in which it is made to appear that an error of law has been committed by the Court of Civil Appeals of such importance to the jurisprudence of the State, as in the opinion of the Supreme Court requires correction, but excluding those cases in which the jurisdiction of the Court of Civil Appeals is made final by Statute. Upon the showing of such an error the Supreme Court may, in its discretion, grant a writ of error for the purpose of revising the decision upon such question alone, and of conforming its judgment to the decision thereof made by it. Until otherwise provided by rule of the Supreme Court the application for writ of error in such a case shall immediately after the title of the cause and the address

to the court, concisely state the question decided by the Court of Civil Appeals in which error is asserted, in order that the Supreme Court may at once see that such a question is presented as is contemplated by this provision. This shall be followed by only such brief and general statement as may be necessary to show that the question was involved in the cause and in the decision of the Court of Civil Appeals. More than one question may be presented in the same application, all being stated in order as above stated.

ARTICLE 1522.

All causes mentioned in Article 1521 may be carried to the Supreme Court either by writ of error or by certificate from the Court of Civil Appeals, as elsewhere provided, but the Court of Civil Appeals may certify any question of law arising in any of the above cases at any time they may choose so to do, whether before or after decision of the case in said court.

ARTICLE 1543.

If upon inspection of the petition for writ of error and the record of the cause it shall appear that a Court of Civil Appeals has failed to file conclusions of fact, or has not complied with the requirements of the law in filing such conclusions, and that such conclusions are necessary to enable the Supreme Court properly to determine the rights of the parties, the court may suspend action on the petition for writ of error and return the record to the Court of Civil Appeals with instructions to make and return conclusions of fact upon the points indicated by the Supreme Court.

ARTICLE 1544.

If, upon examination of the petition for writ of error the Supreme Court shall find the case to be one of which it may take jurisdiction, the Court shall grant or refuse the writ of error or answer the questions certified by the Court of Civil Appeals, as the case may be.

ARTICLE 1526.

The Supreme Court, or any Justice thereof, shall have power to issue writ of habeas corpus as may be prescribed by law, and the said Court, or any Justice thereof, may issue writs of mandamus, procedendo, certiorari and all writs necessary to enforce the jurisdiction of said Court, and said Court may issue writs of quo warranto or mandamus, agreeable to the principles of law, regulating such writs against any district judge or Court of Civil Appeals or judge of the Court of Civil Appeals, or officer of the State Government, except the Governor of the State.

Section 2. Be it further enacted that this Act shall take effect on the first day of July, 1917, and that it shall not affect any business which may be before the Supreme Court at that time, either as to the cases in which application for writs of error have been granted or as to applications for writs of error theretofore filed, or as to matters then pending or thereafter filed with reference to any of such business; provided that if a judgment of the Court of Civil Appeals shall be reversed and the cause remanded such case shall thereafter proceed under the provisions of this Act.

Approved March 15, 1917.

Takes effect July 1, 1917, as provided by law.

APPLICATIONS FOR WRITS OF ERROR TO THE SUPREME COURT.

H. B. NO. 39 CHAPTER 76

An Act to relieve the crowded condition of the dockets of the Supreme Court by further regulating the mode in which and the conditions on which judgments of the Courts of Civil Appeals may be brought before the Supreme Court for revision, granting additional powers to the Chief Justice and the Associate Justices of the Supreme Court and of the Courts of Civil Appeals, as incidental to the offices held by them; providing for compensation of certain Justices of the Courts of Civil Appeals while acting as herein provided, and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. It is made a condition of obtaining a review upon writ of error, by the Supreme Court, of any final judgment of any Court of Civil Appeals, that good cause therefor first be shown in an application for such writ, as heretofore required, the sufficiency of such cause to be determined as herein provided.

Section 2. Provided the Chief Justice of the Supreme Court or any two of the Justices thereof are empowered as soon as this Act shall become a law, by a writing to be recorded in the minutes of the Supreme Court, to designate three of the Justices of the Courts of Civil Appeals to act as hereinafter provided. The powers given to the Chief Justice, or Associate Justices, of the Supreme Court, may be exercised from time to time as long as reason therefor may exist, and the personnel of the designated Justices of the Courts of

Civil Appeals may be changed as often as may be found advisable, by relieving one, or more, and designating another, or others, in order to interfere as little as possible with the work of the Courts of Civil Appeals, such action to be in writing and recorded, as before; and not more than one Justice shall be designated to serve at any one time from any one of these Courts.

Section 3. It shall be the duty of the Justices of the Courts of Civil Appeals so designated, upon receiving notice thereof, to assemble together at the Capitol of the State and to take up, consider and act upon such applications for writs of error, whether then pending or afterwards filed as may be referred to them by Supreme Court or any two Justices thereof, by granting, refusing or dismissing the same in accordance with the practice of the Supreme Court heretofore prevailing; and such designated Justices may make such orders and give such directions, incidental to the consideration and disposition of applications, as are sanctioned by such practice.

Section 4. The granting of an application shall admit the cause into the Supreme Court to be proceeded with by that Court as heretofore provided by law. The refusal or dismissal of an application shall have the effect of denying the admission of the cause into the Supreme Court, except that motions for rehearing may be made to such designated Justices in the same way as such motions to the Supreme Court have been heretofore allowed; provided, that the refusal or dismissal of any application shall not be regarded as a precedent or authority in any other cause; and, provided, that no one of such Justices shall par-

ticipate in acting upon an application in a cause decided during his incumbency by the court of which he is a member.

Section 5. The Supreme Court shall still have power to act upon applications for writs of error, when deemed expedient, and the same power is hereby conferred upon the Justices of that Court, action by any two of whom shall be sufficient. And in any cause in which the Judges of the Courts of Civil Appeals shall have disagreed, or which the Court of Civil Appeals shall have held differently upon the same question of law the holding of another Court of Civil Appeals or of the Supreme Court, or shall have declared void a Statute of the State, the application for writ of error shall be passed upon by the Supreme Court.

Section 6. The powers herein conferred upon the Chief Justice and Associate Justices of the Supreme Court and of the Courts of Civil Appeals are declared to be incidental to the offices held by them respectively.

Section 7. Justices of the Courts of Civil Appeals shall be entitled to have their actual and necessary expenses incurred in going to, remaining at and returning from the Capitol in the discharge of the additional duties hereby imposed upon them, paid out of the State Treasury from warrants drawn by the Comptroller, based upon itemized accounts of such expenses, verified by the certificate or affidavit of the claimant.

Section 8. The great delays, often amounting to a denial of justice, in the disposition of business in the Supreme Court, owing to the accumulation of more work than can be done by the Judges thereof, create an imperative public necessity and an emergency

for the suspension of the constitutional rule requiring bills to be read on three several days in each House, and for putting this Act in force from and after its passage, and it is accordingly so enacted.

Approved March 16, 1917.

Became a law March 15, 1917.

* * * * *

ARTICLE 1748, R.C.S. 1925:

The Chief Justice of the Supreme Court or any two Justices thereof may, by a writing recorded in the minutes of the Supreme Court, designate three of the Justices of the Courts of Civil Appeals to act as hereinafter provided. Such powers may be exercised from time to time in the same manner as long as reason therefor may exist, and the personnel of the designated Justices of the Courts of Civil Appeals may be changed as often as may be advisable, by relieving one, or more, and designating another, or others, in order to interfere as little as possible with the work of the Courts of Civil Appeals. Not more than one Justice shall be designated to serve at any one time from any one of these courts.

ARTICLE 1749, R.C.S. 1925:

The Justices of the Courts of Civil Appeals so designated, upon receiving notice thereof, shall assemble together at the State Capitol and take up, consider and act upon applications for writs of error as may be so referred to them, by granting, refusing or

dismissing the same in accordance with the practice of the Supreme Court; and then such designated Justices may make such orders and give such directions, incidental to the consideration and disposition of the application.

ARTICLE 1750, R.C.S. 1925:

The granting of an application shall admit the cause into the Supreme Court to be proceeded with by the Court as provided by law. The refusal or dismissal of an application shall have the effect of denying the admission of the cause into the Supreme Court, except that motions for rehearing may be made to such designated Justices in the same way as such motions to the Supreme Court have been heretofore allowed. The refusal or dismissal of any application shall not be regarded as a precedent or authority.

ARTICLE 1751, R.C.S. 1925:

No one of such Justices shall participate in acting upon an application in a cause decided during his incumbency by the court of which he is a member.

ARTICLE 1752, R.C.S. 1925:

The Supreme Court shall still have power to act upon applications for writs of error, when deemed by it expedient. In any cause in which the Judges of the Courts of Civil Appeals shall have disagreed or shall have declared void a statute of the State, the application for writ of error shall be passed upon by the Supreme Court.

APPENDIX E.

ACT OF 1927

FIXING JURISDICTION OF SUPREME COURT

S. B. No. 7 CHAPTER 144

An Act to amend Article 1728 of Chapter 3, of Title 37 of the Revised Civil Statutes of Texas of 1925, relating to and better defining and fixing the appellate jurisdiction of the Supreme Court of Texas, and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

Section 1. That Article 1728 of Chapter 3 of Title 37 of the Revised Civil Statutes of Texas, be, and the same is hereby amended so as to read as follows:

Article 1728. Appellate Jurisdiction.—The Supreme Court shall have appellate jurisdiction co-extensive with the limits of the State, extending to all questions of law arising in the following cases when same have been brought to the Courts of Civil Appeals from final judgment of trial courts:

(1) Those in which the judges of the Courts of Civil Appeals may disagree upon any question of law material to the decision.

(2) Those in which one of the Courts of Civil Appeals holds differently from a prior decision of its own, or of another Court of Civil Appeals, or of the Supreme Court upon any such question of law.

(3) Those involving the construction or validity of statutes necessary to a determination of the case.

(4) Those involving the revenues of the State.

(5) Those in which the Railroad Commission is a party.

(6) In any other case in which it is made to appear that an error of substantive law has been committed by the Court of Civil Appeals which affects the judgment, but excluding those cases in which the jurisdiction of the Court of Civil Appeals is made final by statute.

In all cases where the judgment of the Court of Civil Appeals is a correct one and where the principles of law declared in the opinion of the court are correctly determined, the Supreme Court shall refuse the application; in all cases where the judgment of the Court of Civil Appeals is a correct one but the Supreme Court is not satisfied that the opinion of the Court of Civil Appeals in all respects has correctly declared the law, it shall dismiss the case for want of jurisdiction.

Provided further that in cases of conflict named in Subdivision 2 above, the Supreme Court may, in its discretion refuse the writ of error where the court is in agreement with the decision of the Court of Civil Appeals in the case in which the application is filed; and in cases of such conflict with a previous opinion of the Supreme Court, the Supreme Court may, in its discretion, without the necessity of granting the writ and hearing the case, reverse and remand the same on the application for writ of error.

Section 2. The fact that the language of the present statute relating to the appellate jurisdiction of the Supreme Court of this State is, in many respects, vague and indefinite, rendering it frequently uncertain as to what constitutes the appellate jurisdiction of the Supreme Court of Texas, the importance of having the

present statute upon this subject amended so as to better define what such jurisdiction is, the approaching close of the present session of the Legislature and the crowded condition of the calendar of both Houses, creates an emergency and an imperative public necessity which requires that the Constitutional rule requiring bills to be read on three several days in each House be suspended, and that this Act take effect and be in force from and after its passage, and it is so enacted.

Approved March 25, 1927.

Effective (90) ninety days after adjournment.

APPENDIX "F"

Commission of Appeals
Section A
No. 9

The Gammel Statesman Publishing Co., et al.,
Plaintiffs in Error,

vs.

From Travis Co.
3rd Dist.

Ben C. Jones & Co.,
Defendants in Error.

The judgment of the trial court in this cause was affirmed by the Court of Civil Appeals for the Third Supreme Judicial District on May 24, 1911. 141 S.W., 1048. On June 6, 1911, defendants in error filed their original motion for rehearing in said cause. The court adjourned without acting on this motion, but over-ruled same at its next term on December 6, 1911. On January 4, 1912, defendants in error filed their application for writ of error to the Supreme Court

and the same was denied on February 7, 1912. On February 24, 1912, defendants in error filed in the Supreme Court their motion for rehearing on the refusal of their application for writ of error and said motion was over-ruled on February 28, 1912. On March 25, 1912, defendants in error filed in the Supreme Court an application for mandamus against the judges of the Court of Civil Appeals for the Third Supreme Judicial District to require the latter court to grant a rehearing and reopen the case, and this was refused on April 3, 1912. Defendants in error next filed in the Supreme Court an application for mandamus against the Judge of the Trial Court and same was refused. On May 28, 1912, defendants in error filed in the Court of Civil Appeals a motion styled "motion to vacate judgment". This motion was refused by the court on October 12, 1912. On October 23, 1912, defendants in error filed in the Court of Civil Appeals what they termed "motion for rehearing of motion to vacate judgment" and this was overruled on January 8, 1913. On January 15, 1913, defendants in error filed in the Court of Civil Appeals a motion designated "supplemental motion for rehearing of motion to vacate judgment". The Court of Civil Appeals on February 19, 1913 granted this motion and entered judgment, setting aside its former judgment rendered May 24, 1911, affirming the judgment of the District Court and all other orders and decisions made by it subsequent to that time and reversed and remanded the cause for a new trial.

Plaintiffs in error contend that said court was without authority to grant the motion, because same was filed and acted upon at a subsequent term of the court

to that at which its original judgment was rendered and after the Supreme Court had denied a writ of error in said cause. This is the only question presented for review.

We conclude, after a careful examination of the motion in connection with the record, that while not so designated, it is in substance a motion for rehearing within the meaning of that term as used in articles 1633 and 1641, Revised Statutes, 1911. The Court of Civil Appeals so held in granting the motion. 156 S.W., 317.

The motion was not filed within the time allowed for the filing of motions for rehearing and was not acted upon at the term of the court at which the original judgment was rendered. This being true, the court was without authority to take any action on the motion and the judgment entered granting the motion and setting aside and vacating the original judgment rendered by said court in said cause and reversing and remanding the case to the trial court, must, we think, be held to be void and of no effect. Articles 1633 and 1641, R.S. 1911. McGhee vs. Romatka, 92 Texas, 241. The original judgment of affirmance stands just as if the motion had not been filed.

It is contended that under the holding in the case of McGhee vs. Romatka, supra, this court is without jurisdiction to review the action of the Court of Civil Appeals in granting the motion.

The motion in the case before us was filed and acted upon by the Court of Civil Appeals after the Supreme Court had refused a writ of error in said cause and by such action affirmed the original judgment of the Court,

of Civil Appeals and that of the trial court. The judgment of the Court of Civil Appeals entered in granting the motion not only set aside and vacated its judgment rendered at a former term, but also in effect set aside and vacated the judgment of the Supreme Court in denying the writ of error in said cause. It is well settled that when the jurisdiction of the Supreme Court attaches, the court has full control of the cause and can make such orders concerning it as may be necessary to preserve the rights of the parties and enforce its mandates. Its jurisdiction continues until the case is fully determined by the court and its judgment is completely executed by the court below. For the purpose of enforcing its mandates, it may make any order and, if necessary, may resort to the writ of mandamus or any other appropriate writ known to our system of jurisprudence. Wells vs. Littlefield, 62 Texas, 28. The action of the Supreme Court in refusing a writ of error in this cause was binding on the Court of Civil Appeals. The Court of Civil Appeals at the time the motion under review was filed and acted upon was without jurisdiction of the case and had no power to enter any order or judgment therein. To hold otherwise would be to deny to the Supreme Court its power as a court of last resort. The question of the power of the Supreme Court to enforce its own jurisdiction was not before the court in the case of McGhee vs. Romatka.

We are of opinion that the motion to dismiss the application for writ of error should be over-ruled and that the order and judgment entered by the Court of Civil Appeals setting aside and vacating its former

judgment and reversing and remanding the cause for a new trial should be held to be void and of no effect.

Strong

Judge.

The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court. We approve the holding of the Commission on the question discussed.

Nelson Phillips

Chief Justice.

December 11th, 1918.

(ENDORSED)

No. 9 COMMISSION OF APPEALS Section A. No. 2572 The Gammel Statesman Publishing Company, et al., Plaintiffs in Error vs. Ben C. Jones & Co., Defendant in Error. OPINION. Order of Crt. of Civ. App. App. vacating its original judgment remanding the cause to the Dist. Crt. is reversed and the cause is remanded to the Crt. of Civ. App. for the execution of its original judgment. Filed in Supreme Court Dec'r. 11. 1918. F. T. Connerly, Clk. By H. L. Clamp, Depty.

Strong, Judge.

I, S. A. PHILQUIST, Clerk of the Supreme Court of Texas, hereby certify that the attached and foregoing five typewritten pages contain a true and correct copy of the opinion of the Commission of Appeals, Section "A", in the above styled and numbered cause, which opinion was adopted by the Supreme Court on the 11th day of December, 1918, as the same appears on file in my office.

Witness my hand and the seal of said Court at the City of Austin, this, the 5th day of April, 1937.

S. A. PHILQUIST

(Seal)

Clerk of the Supreme Court of the State of Texas.

APPENDIX G.

ARTICLE 1767, R. C. S. TEXAS, 1925.

"Whenever the Supreme Court shall affirm a judgment or decree of a Court of Civil Appeals, it shall render such judgment or decree as should have been rendered by the Court of Civil Appeals, and shall render judgment against the plaintiff in error and the sureties, on his appeal or supersedeas bond, for the performance of said judgment or decree, and shall make such disposition as to the costs as they may order."

ARTICLE 1768, R. C. S. TEXAS, 1925.

"Upon the rendition by the Supreme Court of any such judgment or decree as is contemplated by the preceding article, it shall not be necessary for the lower court from which the cause was removed to make any further order or decree therein, but the clerk of said lower court, on receipt of the

mandate of the Supreme Court or Court of Civil Appeals, shall proceed to issue execution thereon as in other cases."

Rule 4, Supreme Court of Texas.

When the application shall have been filed for a period of ten days, if the court shall determine to refuse the same, then, whether the defendant has answered or not, the clerk of the court will retain the application, together with the transcript and accompanying papers, for fifteen days, from the day of rendition of the judgment refusing the writ. At the end of that time, if no motion for rehearing has been filed or upon the overruling or dismissal of such motion, in case one has been filed, the clerk of this court shall transmit to the Court of Civil Appeals to which the writ of error is sought a certified copy of the orders of this court denying such application and of the order overruling the motion for a rehearing thereof, and shall return the papers which belong to that court to the clerk thereof, but shall retain the petition for writ of error. A motion for rehearing of an application for writ of error is not a matter of right, but in case such motion shall be filed within fifteen days after the refusal of the application and before the court shall adjourn for the term, the court will consider the same if it be based upon a ground not embraced in the application or contains the citation of authorities not before cited. The presentation of any point or points presented in the application without urging some new argument or citing some new authority will be deemed a sufficient ground for dismissing the motion.